The Madras Law Journal.

PART XVI.] APRIL, 1919. [VOL. XXXVI.

ADOPTIONS AND ALIENATIONS BY HINDU WIDOWS:—

SOME RECENT CASES.

Speaking of the then state of the authorities on the question of a Hindu widow's power to alienate her husband's estate with the consent of the reversioners, it was remarked by Srinivasa Iyengar, J., in *Mulugu Kotayya* v. *Mudikonda* [1]. 'If anything is certain it is only this, that the doctrine, whatever it is, is incapable of logical expansion or even of logical application.' We are not sure how far the Judicial Committee will concur in this confession of despair, especially in view of their recent disapproval of the frame of mind which finds consolation in Lord Halsbury's dictum about law being not always logical (See *Rangasami* v. *Nachiappa* [2]). The conflict of decisions which drove the learned Judge to despair (as above) was in a large measure the outcome of the enigmatic pronouncement of their Lordships in *Bajranji Singh's case*, [3] and after all the confusion (not to say havoc) wrought thereby for more than a decade, the committee have availed themselves of the opportunity that arose in Rangasami Gounden's case to explain the import of that decision. But explain it as one may, it still remains a riddle and in spite of the pretty full discussion now by their Lordships 'of the whole subject,' we are not without misgivings as to the result thereof.

To begin with, the latest pronouncement treats the doctrine of acceleration or surrender as settled beyond doubt and there is nothing to warrant the doubts suggested about it in a recent decision of the Bombay High Court *Dudbasappa* v. *Baswaneppa* [4]. Next, a prevalent misinterpretation of the requisites laid down in *Behari Lal's case* [5] for a valid surrender is sought to be corrected by insisting on the total 'effacement' of the widow. Thirdly, the widow's powers of alienation

1. (1916) 31 M. L. J 406 at p. 418. 2. (1918) 36 M. L. J. at p. 504.
3. (1907) I. L R. 30 A. 1. 4. (1918) I L. R. 42 B 719.
5 (1891) L R 19 I. A. 30.

are emphatically dissociated from this doctrine of surrender. But when the judgment speaking of 'alienations' proceeds to say "if the alienation be total and the reversionary heirs be the nearest, it falls within the first division"—we presume that 'the first division' refers to the theory of surrender—it gets on to debateable ground. What is the kind of transaction here referred to? It cannot be a 'gift,' for later on they hold that the 'presumption' of necessity arising from the consent has no application to gifts. Can the observation relate to an alienation for 'consideration.' Surely it is difficult to speak of or justify a *conversion* of the estate by the widow as a 'surrender.' Their Lordships' language is quite general and their remarks, in the course of the judgment, as to *Nobokishore's case* [1] and the grounds on which the decision in *Bajrangi Singh's case* [2] may be supported add (as we shall presently show) to the difficulty of ascertaining their true opinion on this question.

Dealing next, with alienations of *part* of the estate, the Judicial Committee state that the consent of reversioners to such alienations 'does not give force *per se* but is of evidential value.' They combat the theory that 'the reversioner together with the widow represents the whole estate' as also the view that the 'eventual reversioner' can be held to claim through or be estopped by the acts of 'one who went before him.' What then is their explanation of *Bajrangi Singh's case*? Negatively, they say that the decision could not have intended 'to lay down a new doctrine' but only 'affirmed the Calcutta as against the Allahabad rule' *leaving the operation of consent to stand on the pefectly logical grounds of the authorities quoted.* On the facts of the case they observe that 'although there were three successive alienations, they *in cumulo* amounted to an alienation of the *whole* immoveable property' and further that 'the alienations were all made for purposes of ostensible necessity' and therefore, they suggest that the alienations there 'might possibly have been supported on either ground' that is, we take it, either on the theory of surrender or on the presumption of propriety afforded by the concurrence of the reversioners.

With all respect, it is difficult to follow their Lordships' view as to the possible application of the doctrine of surrender to the facts of '*Bajrangi Singh's case*. The alienations were

1. (1884) I. L. R. 10 Cal. 1102 2. (1907) L. R. 35 I. A. 1.

admittedly piecemeal and at different times; they were and purported to be alienations to a *stranger* and that too *for consideration*; the reversioners had nothing to do with them at the time they were made and in fact questioned some of them by legal proceedings and when ultimately they executed deeds of relinquishment giving up their objections they did so *on receipt of consideration.* We find it impossible to reconcile the upholding of such a transaction by reference to the theory of surrender with their Lordships' clear observations in the present case that a surrender involves the effacement of the widow (on the analogy of a civil death) that it must be in favour of the nearest reversioner or reversioners and that it must be a *bona fide* surrender and not a device to divide the estate with the reversioner. How are we, from the mere fact that the several alienations, in the end and in their totality, exhausted the whole estate, to import a fiction of 'surrender' into a transaction which was meant to be something very different and how again, can it make any difference on the question of *bona fides* that the widow and the reversioners (by their subsequent agreement) arrange to divide between themselves not the estate but the proceeds of the sale of the estate? In *Debi Prasad's case.* [1] Mookerjee J., seeks to justify the application of the surrender theory to the case on the ground of a fictional withdrawal of the widow's estate and an equally fictional alienation by the reversioner. But the limitations as to surrender will not only become an 'idle rule' but a mockery if the widow and the presumptive reversioner together may more easily and conveniently dispose of the *whole* estate for their own benefit than convert only a *part* thereof.

With reference to the application to that case of the other rule, *viz.,* as to the presumption afforded by the concurrence of the reversioners, there is this to be observed, that from a common sense point of view, it is not easy to draw an inference of inherent propriety in favour of a transaction from the fact that a person who first files a suit to question it subsequently withdraws his objection on receipt of some consideration. But even apart from this evidentiary point of view, there is the more serious aspect raised by Srinivasa Iyengar, J., in *Muluga Kottayya's case, viz.,*

1. (1918) I. L. R. 4 O. C. 721.

whether a consent that is *purchased* can be recognised at all. There is something to be said in favour of the view (held by some of our reformers) that the widow should be conceded full powers of alienation ; there is again a decent volume of legal opinion that the widow and the immediate reversioner, as between themselves, represent the *full* estate and in combination may do *what they like* ; but it would certainly introduce a demoralising factor into an already complicated socio-legal system if the law should, while in theory negativing both the above claims, practically put it in the power of a presumptive reversioner to defeat the eventual reversioner by a transaction calculated to benefit himself and the widow at the expense of the ultimate heir.

Apart from what may be called the Hindu Law rules (as discussed above) their Lordships further recognise that on general principles a particular person may by his conduct either before or subsequent to the widow's alienation preclude himself from impeaching the same. This may arise either by way of estoppel as defined in S. 115 of the Evidence Act or out of conduct akin to election or ratification. In view of decisions like *Gur Narayan* v. *Sheo Lal Singh* [1] and *Lala Rup Narain* v. *Gopal Devi* [2] it may be taken that no estoppel will arise from the mere circumstance that the reversioner consented to or attested or even joined in a conveyance by the widow. The question will turn on the exact nature of the representation made by or implied from the conduct of the reversioner and its effect on the alienee.

Before taking leave of this part of the subject we may as well refer briefly to the bearing of this judgment of their Lordships on some questions raised or dealt with in certain recent decisions of the High Courts in India. Their remarks as to the basis and requisites of the surrender theory go to confirm the view taken in *Malla Suriah* v. *Suran Naidu* [3] and *Dodbasappa* v. *Basawaneppa* [4] that when the immediate reversioners are more than one of equal grade there cannot be a valid surrender in favour of only one or some of them without the consent of the rest. Where the latter consent to such a course the transaction would rather have to be dealt with in the light of the

1. (1918) L. R. 46 I. A. 1=36 M. L. J. 63 2. (1909) I. L. R. 36 C. 780.
3. (1916) 3 L. W. 278. 4. (1918) I. L. R. 42 B. 719.

rules governing alienation, for if the operation of a surrender is by way of opening the succession to the heirs, the consent of some of them cannot vary the rules of succession and it will be an unwarranted fiction to imply a vesting of the succession in all and a further transfer by some of them to the actual surrenderees. In *Manugara Satyalakshmi Narayana* v. *Manugara Jagannadham*, [1] it was held on the strength of some observations in *Mulugu Kotayya's case* that where the widow in possession had two daughters and one of the latter had a son, there could be a valid surrender of the estate by the widow in favour of the grandson with the consent of the daughters. See also *Chinnaswami* v. *Appaswami*. [2] This again seems to us an extension of the doctrine not quite consistent with the basis underlying it. Viewed as an alienation alone it is very doubtful if the consent of the daughters will suffice to give it any greater validity than it would otherwise possess. Again the decision in *Chinnaswami* v. *Appaswami* [2] that the securing of a provision for the maintenance of the surrendering widow will not detract from the validity of the surrender is also not quite in keeping with the spirit of that doctrine. It is no doubt possible as a matter of law to draw a distinction between the retention of the 'widow's estate' in some of the properties and the creation of a mere maintenance charge on the whole, but the countenancing of a distinction founded on the quantum of benefit secured to the widow will introduce serious uncertainty, if not also encourage attempts to circumvent the law with a view to benefit one set of heirs to the prejudice of those who in the ordinary course have better chances of succeeding the widow. With all respect we are unable to agree in the theory suggested by Sadasiva Aiyar, J., in *Chinnaswami Pillai's case* that the doctrine of surrender is something meant for facilitating the better management of properties and giving relief to female heirs. The result will be to give them the benefit of the heirship without the burdens of ownership and the Privy Council decisions at any rate do not warrant this view.

A more difficult question was raised in the recent Bombay case (*Dodbasappa* v. *Baswaneppa*), [3] but left open, *viz.*, the validity of a surrender as against a son subsequently adopted by the

1. (1917) 34 M. L. J. 229. 2. (1918) 35 M. L. J. 512.
3. (1918) I. L. R. 42 Bom. 719.

widow herself. In *Sri Ramulu* v. *Krishnamma* [1] Sir Bashyam Aiyangar, J., by an elaborate logico-arithmetical process arrived at the conclusion that with respect to his capacity to impeach transactions entered into by the widow prior to his adoption the adopted son stood practically on the same footing as any other reversioner. A logical extension of that view will perhaps support the contention that once the widow had *bona fide* surrendered her estate the subsequently adopted son could no more question it than a reversioner who at her death would succeed as heir but for the surrender. *Sri Ramulu* v. *Krishnamma*, [2] has however been overruled by the Full Bench in *Vydhianatha Sastri* v. *Savithriammal* [3] and dealing with this matter as *res integra*, it is difficult to see how the casting of the succession on somebody by the act of the widow would be a greater obstacle in the way of the adopted son than a similar casting of the succession by the law itself. It is now well established that the adopted son would divest not merely the widow but also any heir (or successor) in whom the law may vest his father's estate in the absence of the adoption. (See the latest decision of the Judicial Committee in *Pratapsing Shivsing* v. *Agarsinji Raisinji* [4]. It is perhaps possible to suggest that if the analogy between surrender and civil death is at all well-founded the widow by her surrender becomes civilly dead so far as her husband's estate is concerned and that this in some way may deprive her of her power of adopting a son to take that estate. We are however not aware that this point of view has anywhere been suggested or considered.

The effect as against the adopted son of the consent given to an alienation by the widow by the person who was presumptive reversioner at the time is also not beyond doubt. It may be said that if the consent is a good piece of evidence as to the propriety of the transaction as against the ultimate reversioner, there is no reason why it should not similarly avail as against the adopted son. But we are not sure if the peculiar importance attached to the consent of the presumptive reversioner (as distinguished from that of the remoter reversioners) is not in a manner connected with the theory that the presumptive reversioner represents the whole

1 (1902) I. L. R. 26 M. 143. 2. (1902) I. L. R. 26 M. 143.
3. (1917) I L. R. 41 M 75 4. (1918) L. R. 46 I. A. 97=36 M. L. J. 511.

body of reversioners, and this theory of representation may not hold good as against the adopted son.

It remains to say a few words about the analogy sometimes suggested between the consent of reversioners to an alienation by the widow and the consent of sapindas to an adoption by her. This was relied on by Sankaran Nair, J., in *Rangappa Naik* *Kamti Naik* [1] and by Seshagiri Aiyar, J., in *Suryanarayana* v. *Ramadas* [2] but disapproved of by Srinivasiengar, J., in *Mulugu Kotayya's case*. The Privy Council have however given some countenance to this analogy by adopting Mr. Sircar's dictum that on the question of whose consent is requisite to the validation of an adoption when the husband is separate,' 'some light is thrown . . . by the decisions relating to alienations by widows with the assent of the next heir' (*Veera Basavaraju* v. *Balasurya* [3].) It ought not to be overlooked in this connection that while the rules as to alienation are common to all India the rule as to Sapinda's consent to the widow's adoption is restricted to the Dravida country where it has been upheld rather on the ground of usage, cf. per Wallis, C. J., in *Doraisami* v. *Chinnia* [4]. The textual authority referred to in the *Ramnad case* [5] (barring perhaps the Viramitrodaya) bases the rule on the practice of Niyoga but this can have no bearing on the question of alienations and the Privy Council do not accept it either. But even apart from this question of the difference in the *bases* and local extent of the two rules, the other points of dissimilarity between the two topics are so many that with all respect we cannot help feeling that the analogy will be more misleading than useful. The rule as to Sapinda's consent is (in the tracts where it obtains) of the very essence of the widow's power to adopt while that relating to the effect of reversioner's consent on her alienations is at best a rule of evidence, called in aid of something which the widow could do even without such consent and allowing also of rebuttal by proof of other circumstances. In *Bajrangi Singh's case* the Privy Council saw no objection to relying on a consent (1) given for consideration and that too (2) long subsequent to the event. But it has been held, and if we may say so, rightly, that in the case of an adoption the consent of Sapindas purchas-

1. (1908) I. L. R 31 M. 366. 2. (1917) 34 M. L. J. 87.
3. (1918) I. L. R 41 M. 998. 4. (1917) 34 M. L. J. 258.
5 (1868) 12 M. I. A. 397.

ed by payment of money is of no efficacy (*Danakoti* v. *Balasundara*) [1] nor a consent obtained after the event (*Doraisami* v. *Chinnia*) [2]. Again, the act of adoption being a religious duty, it has been recognised that if the nearer Sapindas unreasonably withhold their assent, the widow may act on the consent of the remoter Sapindas, though she is in any event bound to apply to the nearer relatives as well. We are aware of no such rule in respect of alienations. Further it seems to us also possible sometimes that the classes of persons to be consulted may differ in the two cases. Take a case in which a widow may have a divided father-in-law on the one hand and a daughter's son on the other. The presumptive reversioner will be the latter while the person competent to authorise an adoption by the widow will undoubtedly be the former. And we are not sure if a similar problem may not arise even when the husband leaves divided brothers on the one side and a daughter's son on the other. Lastly, the consent of Sapindas to an adoption by the widow may be a general and prospective one, not referring to any specific boy or to a transaction to take place immediately but such a consent to a future alienation is hardly likely to be of any avail (see *Rangappa Naik* v. *Kamti Naik* [3].)

In *Suryanarayana* v. *Ramadass* [4], Ayling and Seshagiri Iyer, JJ., were led (to a certain extent) by this analogy to the conclusion that a consent to an adoption once given by a Sapinda cannot be withdrawn by him except for justifiable reason and that neither lapse of time nor even the death of that Sapinda affects the efficacy of that consent. Apart from the soundness of the analogy (in view of the considerations above stated) we cannot help feeling, with all respect, that these conclusions do not follow even from that analogy. The reason of the rule relating to the reversioners' consent would rather suggest that it could afford little support to an alienation made years after the consent was given and the spirit of the observations in the authorities on the point would seem to indicate that the consent referred to is that of the nearest reversioner *at the time of the alienation* and not one who was dead long ago. The instance relied on by Seshagiri Iyer, J., that if the presumptive reversioner *at the time of the alienation* consents, the fact of his death *before*

1. (1911) I. L. R. 36 M. 19.
2. (1917) 34 M. L J 258.
3. (1208) I. L. R. 31 M. 366.
4. (1917) 34 M. L J 87.

the reversion falls in will not affect the situation, is a very different matter. Nor are we aware of any rule or reason that if once a reversioner signifies his consent to an alienation proposed to be made by the widow he is not (apart from any question of contract arising from receipt of consideration) entitled at any time *before* the alienation to withdraw or revoke such consent at pleasure. If any argument from analogy is to be relied on, one may perhaps usefully remember that the consent of sapindas to an adoption is a substitute for the husband's authority and as there is nothing to prevent a husband from revoking at pleasure an authority conferred by him on his wife, the same rule will apply to sapindas as well. There is however this difference in the case of sapindas that if the widow finds that the near sapinda was unreasonably revoking his consent she may obtain the assent of a remoter kinsman and act on it; but it is difficult to see sufficient warrant for the view that she may merely ignore the revocation or withdrawal and act on the original consent.

SUMMARY OF ENGLISH CASES.

Rodriguez *v.* **Speyer Bros.** : 1919 A. C. 59.

Alien enemy—Partner of a firm—Other partners British subjects—Disability of alien enemy to sue—Action in partnership name whether maintainable.

S, a German resident in Germany carried on business in London in partnership with four British subjects and an American citizen which partnership became dissolved by the declaration of war with Germany. An action was subsequently commenced in the name of the firm for the recovery of a debt alleged to have accrued before the war and the question was raised whether the action was maintainable as one of the partners was an alien enemy.

The majority of the House of Lords (The Lord Chancellor Viscount Haldane and Lord Parmoor) *held* that the action was maintainable and laid down that British subjects and neutral friends in partnership with an enemy alien at the outbreak of war, which partnership *ipso facto* then determined, were entitled during the continuance of the war to take action to enforce rights which had legally accrued in their favour prior to the

outbreak of war, although there was no possibility that during the war the enemy alien would be enabled to derive any immediate benefit as the result of the action.

Lords Shaw and Sumner *held* that it is an inflexible rule of law that an alien enemy cannot maintain an action in British Courts and that the rule admits of no exceptions barring possibly cases where he sues as an executor or administrator.

Casdagli *v.* **Casdagli**: (1919) A. C. 145.

Domicil—British protected subject—Residence in Egypt—Effect—Suit against him in English court for dissolution of marriage—Maintainability—Jurisdiction.

A British subject, registered as such at the British consulate, can, in point of law, acquire a domicil in Egypt.

In a suit for dissolution of marriage brought against a British subject who had domicil of origin in England but had migrated to Egypt, resided there as a British protected subject, married in Egypt and subsequently made his permanent home there without any intention of returning to England, *held* that the defendant had acquired an Egyptian domicil and that the English court had no jurisdiction to entertain the suit.

Dominion Trust Company *v.* **New York Life Insurance Co.**: (1919) A. C. 254.

Appeal—Finding of fact—Interference—Principle—Distinction between cases in which decision depends upon view of conflicting testimony and view of inferences from admitted facts.

The rule that a court of appeal ought not to interfere with a finding of pure fact arrived at by the Judge who had tried the case and seen the witnesses applies only to cases in which the decision depends on the view taken of conflicting testimony. It is inapplicable to cases in which the decision depends upon the inferences to be drawn from facts as to which there is no controversy.

(1904) A. C. 73, 75 referred to.

In re **J. Wigfull and Sons' Trade Marks**: (1919) 1 Ch. 52 (C A.)

Appeal—Decision of inferior court—Expiration of time for appeal—Subsequent decision of court of appeal in another case—

Judgment in first case overruled—Application to enlarge time for appeal.

The mere fact that in a subsequent case the court of appeal had taken a different view of a question of law from that taken by an inferior court in a previous case is not a ground for enlarging the time for appeal from the decision of that court.

Clay *v.* **Booth** : *In re* **a deed of Indemnity** : (1919) 1 Ch. 66 (C. A.)

Practice—Action for declaration that a person is not entitled to certain right—Right not asserted or denied—Maintainability of action.

An executor under a will was desirous of renouncing probate, but was pressed to accept the office by the beneficiaries and consented to do so on their executing a bond of indemnity. In proceedings in the administration, the executor was ordered to pay costs to some of the beneficiaries. In sending a cheque for the costs, the executor wrote that he reserved his rights under the indemnity bond. Thereupon the beneficiaries brought the present action for a declaration that they were not liable under the bond to repay the costs.

Held, that the action was not maintainable as no right was asserted by the executor or denied by the beneficiaries. The relief for declaration cannot be claimed on the mere ground that a person apprehended that a claim will be made against him.

In re **Lyne's Settlement Trusts Lyne** *v.* **Gibbs** : (1919) 1 Ch. 80 (C. A.)

Personal estate—Freehold land in England—Trusts for sale—Share in proceeds of sale—Disposition of, by Holograph unattested French Will—Validity—Wills Act, 1861, S. 1.

Wills Act, 1861 (Lord Kingsdown's Act) S. 1 provides that, so far as personal estate is concerned, the will of a British subject, whatever his domicil may be, shall be held to be well executed for purposes of probate, if it was made according to the law of the place where it was made, or according to the law of the place where the testator was domiciled, when he made the will, or according to the law then in force in that part of the British dominions where he had his domicil of origin.

A beneficial interest under a settlement under which real estate is held in trust to sell and divide the proceeds of sale is personal estate within the meaning of Lord Kingsdown's Act; and a disposition of such property by a holograph unattested French Will (valid according to the law of France) by a British subject resident in France is valid and effective.

"Property which would pass by law to and devolve upon executors and administrators is personal estate."

[Per Cotton, L. J. in *Chandler* v. *Pocock*, 16 Ch. D 648, 653] Ref.

In re **Dawson Sainson** *v.* **Dawson**: (1919) 1 Ch. 102.

Will—Gifts to children and grandchildren—Subsequent advances to children—Doctrine of double portions, if applies to unadvanced grandchildren.

The doctrine against double portions is applied only to cases, where the testator is the parent or stands in *loco parentis* to the devisee. The benefit of the doctrine cannot be claimed by grandchildren, when it is not shown that the grandfather of testator stood in *loco parentis* to his grandchildren.

In re **Rogerstone Brick and Stoen Co. Sonthall** *v.* **Wescomb**: (1919) 1 Ch. (C. A.)

Mortgage—Leasehold—Fixtures—Interest in, if passes to mortgagee.

A mortgage or assignment out and out of all a leaseholder's interest in the property itself, as distinguished from the fixtures, carries with it also the interest in the fixtures attached to the property. It would extend also to fixtures subsequently attached to the premises. The mortgagee would, at any time during the lease, have the benefit which his mortgagor had of removing those chattels that had been attached to the premises anterior to his mortgage, and also that were subsequently attached thereto posterior to his mortgage.

In re **Garside Wragg** *v.* **Garside**: 1919 1 Ch. 132.

Accumulation— Implied trust— Will — Unapplied income not disposed of—General residuary bequest—Thelluson Act, (1800)

Where there was a trust implied to accumulate the surplus income freeholds specifically devised on trust for sale and the

period of accumulation exceeded 21 years, and such accumulations were undisposed of, *Held*, that the accumulations during the first 21 years from the testator's death fell into the residue as capital and the rest were income which accrued to the benefit of the life-tenants the direction after that date ceasing to operate.

In re **Stoneham. Stoneham *v.* Stoneham** : (1919) 1 Ch. 149.

Gifts—Inter vivos—Chattels in possession of intended donee—Parol gift—Further delivery, if necessary.

A gift *per verba de praesenti* of chattels in the possession of the intended donee is effectual to pass the property in such chattels without more, and it is not an essential constituent of such a gift that the donor should first regain possession of the chattels and then hand them back to the donee, or should do some other act equivalent to a further delivery of such chattels.

The nature or extent of the user of the chattel by the donee after the gift (although it may afford evidence of the gift having been made) cannot afford a test as to whether the gift was, or was not, complete when it was made.

Westhoughton Urban Council *v.* Wigan Coal and Iron Co.: (1919) 1 Ch. 159 (C. A.)

Mining lease—Covenant not to let down surface and pay compensation for subsidence—Covenant running with the land—Subsequent lessee, if can sue on covenant—Assignee—Privity of contract.

The predecessor-in-title of the owner of certain lands demised the minerals under them to the defendants, subject to a covenant by the defendants and their assigns not to let down the surface and a condition for paying compensation for damage caused by subsidence. The owner then leased to the plaintiffs, reserving the right to mine without being liable for compensation for subsidence. The plaintiffs' lease was subject to the lease in favour of the defendants. Owing to the working of the mines by the defendants the surface went down and the plaintiff's works were damaged. The plaintiffs brought an action for damages.

Held, that the covenant not to let down the surface was a covenant running with the land and the benefit of it was available to the assignee of the lessor, but the plaintiffs who were mere lessees and who were not express assignees of the benefit of the covenant could not sue on the strength of such covenant.

Further held, that the plaintiffs though not entitled to sue on the covenant were entitled to the common law right of support of the surface, *i.e.,* such right as was not taken away by the defendants' case and that having sustained damage by the defendant's infringement of such right were entitled to compensation.

In re **North Eastern Insurance Co.** : (1919) 1 Ch. 198.

Company—Articles of Association—Interested Director—Voting in resolution, reducing Quorum—Passing of resolution in which Director was interested with reduced Quorum—Validity.

The Articles of Association of a company enabled a director to contract with the company, but imposed the condition that he was not to vote in any resolution in which he would be interested as a contracting party. The Quorum for a director's meeting was three but could be altered. In a meeting of the directors in which only three were present a resolution dealing with the issue of debentures to one of the directors present had to be passed. As he could not vote upon it, a resolution at which he voted was passed reducing the quorum to two, and then with the reduced quorum the other resolution was passed.

Held that the resolution was invalid as the resolution reducing the quorum was passed not in the interests of the company but with a view to enable one of the directors to acquire an interest in the company's property.

In re **Jackson** *v.* **Roth** : (1919) 1 K. B. 102.

Gaming—Social club—Portion of premises used for betting—Ordinary amenities of club—Offence—Betting Act 1853, Ss. 1 and 3.

Where a portion of the premises of a social club was used for the purpose of betting by being provided with facilities for such purpose, and to which some of the members who were also bookmakers habitually resorted for gaming, but the rest of the premises were used for the ordinary amenities of a club.

Held, that the house was one opened and kept for the purpose of gaming within the meaning of S. 1 of the Betting Act.

Barker *v.* Stickney: (1919) 1 K. B. 121 C. A.

Copyright—Assignment—Covenant by assignor to account for Royalties, if binds assignee.

Where in a deed assigning a copyright there was a covenant to allow the author a share in the Royalties. and to allow him to inspect the books relating to the publication and sale of the work and to furnish him with accounts, and the deed showed no intention of imposing a charge or reserving a vendor's lien upon the copyright for the Royalties, a purchaser of the copyright, the successor in business of the company to whom the copyright was originally assigned, is not bound by the covenant, as he was not a party to the deed.

Rex *v.* Port of London Authority : Ex parte Kynoch Ltd. (1919) 1 K. B. 176 C.A.

Mandamus—Writ—Issue of—Rules governing.

The grounds on which a mandamus will be granted are difficult to state accurately. Every case must depend on its own particular circumstances ; but decided cases furnish some rules which ought to govern the court in the exercise of its discretion to grant or refuse the prerogative writ of mandamus. There must be something in the nature of a refusal to exercise jurisdiction by the tribunal or authority to whom the writ is to be directed. A refusal may be conveyed in one of two ways : there may be an absolute refusal in terms or there may be conduct amounting to a refusal. In the latter case it is often difficult to draw the line between those cases where the tribunal or authority has heard and determined erroneously upon grounds which it was entitled to take into consideration and those cases where it was heard and determined upon grounds outside and beyond its jurisdiction ; but this conclusion may be drawn from decided cases that there is no refusal to hear and determine unless the tribunal or authority has in substance shut its ears to the application which was made to it, and was determined upon an application which was not made to it.

Manbre Saccharine Co v. Corn Products Co.: (1919) 1. K. B. 198.

Sale—c. i. i. Contract—Nature of—Tender of shipping documents—Knowledge of vendor of loss of ship at date of tender —Tender, if valid—Policy of Insurance—Tender of—Necessary.

The essential feature of an ordinary c. i. f. contract as compared with an ordinary contract for the sale of goods rests in the fact that performance of the bargain is to be fulfilled by delivery of documents and not by actual physical delivery of goods by the vendor. All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the extent of the vendor's duty. The buyer cannot refuse the documents and ask for actual goods, nor can the vendor withhold the documents and tender the goods they represent. The buyer must pay the full price for delivery of the documents, though he can get nothing out of them, and though in any intelligible sense no property in the goods can ever pass to him *i.e.*, if the goods have been lost by a peril excepted by the bill of lading and by a peril not insured by policies, the bill of lading and the policy yet being in the proper commercial form called for by the contract.

A tender by the vendor is valid although at the date of tender he knew that the ship in which the goods had been shipped had been lost.

Among the documents which the vendor is bound to tender is a proper policy of insurance, *i e.*, a policy which covers and covers only the goods mentioned in the bills of lading and invoices.

JOTTINGS AND CUTTINGS.

Lord Kenyon :—" Pray, my Lord ", asked a fashionable lady of Lord Kenyon, "what do you think my son had better do to succeed in the law ? '

" Let him spend all his money, marry a rich wife and spend all hers, and when he hasn't a shilling in the world, let him attack the law."

Once, when sitting in the Rolls Court, indignant beyond measure at the conduct of one of the parties, Kenyon astonished his staid and prosaical audience by exclaiming :

"This is the last hair in the tail of procrastination."

Kenyon's penuriousness was proverbial and increased with advancing years. He ceased to invite even old friends to his table, and his household servants complained that they were required to put up with the same fare their master set for himself.

"In Lord Kenyon's house," a wit exclaimed, "all the year through it is Lent in the kitchen, and Passion Week in the parlor."

Another caustic critic remarked :

"In his Lordship's kitchen the fire is dull, but the spits are always bright."

Whereupon Jekyll testily replied :

"Spits ! In the name of common sense don't talk about his spits, for nothing turns upon them."

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Baron Pollock :—Some one who wished the Baron to resign, waited on him, hinted at his resignation, and suggested it for his own sake, entirely with a view to the prolongation of his valued life, and so forth. The old man rose, and said with his grim, dry gravity, "will you dance with me?" The guest stood aghast as the Lord Chief Baron who prided himself particularly upon his legs, began to caper about with a certain youth-like vivacity. Seeing his visitor standing surprised he capered up to him and said, "Well, if you won't dance with me, will you box with me ?" And with that he squared up to him and half in jest, half in earnest, fairly boxed him out of the room. The old Chief Baron had no more visitors anxiously inquiring after his health.

Pollock was prone to the expression of strong general views, which he conveyed in a manner eminently characteristic, with an idiotic vigor and originality almost amusing. "If," said he, "every man were to take advantage of every occasion to have 'the law' of his neighbour, life would not be long enough for the litigation which would result. All flesh and blood would be turned into plaintiffs and defendants."

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Lord Russell :—Russell is an eminent jurist, a famous orator, and a bright wit. When he was still known as Sir Charles

Russell, he went to Scotland to help the Liberals in a certain campaign. He purposely began his speech with some very badly pronounced Scotch. After the confusion caused by his apparent blunder had subsided, he said.

"Gentlemen, I do not speak Scotch, but I vote Scotch—" Tremendous applause followed, whereupon he proceeded, "and I often drink Scotch."

After this he was the hero of the hour.

During his argument in a case involving the application of nice legal principles, Russell was repeatedly annoyed by the interruptions of Sir Digby Seymour, counsel for the other side. At last, losing all patience, he broke out in his strong Irish brogue :

"I wish you wouldn't interrupt so much, Sir Digby Saymour."

"My name is Seymour, not Saymour", answered Sir Digby, sharply.

"Well, then," rejoined Russell, "you should see more and say less.

A young lawyer, making a legal argument and anxious to finish before adjournment of the Court, was hurrying along as best he could. Suddenly he spoke of 2 Q. B. D. Russell interrupted him sharply, "You forget yourself, sir ! You forget yourself ! That is no way to address this Court."

Profuse in his apologies, the young attorney explained that he only meant to refer 2 Queen's Bench Division of the Law Reports. Russell, refusing to be appeased, said :

"I might as well say to you, U. B. D."

A story credited to Lord Coleridge is also credited in a slightly different form to Russell : and Russell's version is the brighter of the two. When he was visiting America, he took a stroll along the Potomac river with William M. Evarts, then Secretary of State. Arriving at a special point of interest, Evarts said :

"This is where George Washington threw a dollar across the Potomac."

"Oh," responded Russell, "that must have been an easy task for a man who cast a *Sovereign* over the Atlantic."

Russell, years before he took silk, was sitting in court, when another barrister, leaning across the benches during the hearing of a trial for bigamy, whispered, " Russell, what's the extreme penalty for bigamy ? "

" Two mothers-in-law. "

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Sir William Grant :—Many great men have been remarkably silent and taciturn. One of these was Grant, the learned Master of the Rolls. He was the most patient of Judges. He listened for two days to an argument as to the effect of a certain Act of Parliament, and, when counsel had finished, simply said, " Gentlemen, that Act has been repealed."

On one of his visits to his native country of Banff, he rode for a few miles accompanied by some friends. The only observation which escaped him was when passing a field of peas : " Very fine peas." Next day he rode out with the same party and was equally silent, but on again passing the identical field of peas he muttered, "And very finely podded, too."

CONTEMPORARY LEGAL LITERATURE.

Christianity and Law is the subject of an address by Dr. Gary, the Chief Justice of the Supreme Court of South Carolina which is reproduced in the *American Law Review for January* in which the learned Judge summarises the methods adopted to bring the law into conformity with natural justice as represented by the fundamental ethical precepts of Christianity. The idea that there must be a conformity between the two is expressed by the beliefs prevalent among many nations that their laws are derived from God. For instance, Hammurabi's code is represented in an ancient inscription as derived from the Sun God ; the law of the Spartans was believed to have been derived from Apollo, the Roman Law from Goddess Egeria, the Mahomedan Law from the Angel Gabriel and the Mosaic Law from Jehovah. Early Chancellors while issuing their writs founded them upon what they conceived were the precepts of Christianity. There are decisions to the effect that Chirstianity, that is to say, the ethical precepts of Christianity are part of the law of the land. No person who denies the existence of a Supreme Being can hold office under the American constitution. The growth of Roman Praetorial Jurisdiction

equally with the English Equity Jurisdiction is the result of the same process of approximation of law to justice. The duplication of institutions under the English system is a defect in that system which was avoided by the Roman system. In a recent opinion by Mr. Justice Holmes he advances the proposition that no judgment should be rendered that is against natural justice. Although a precedent may not have been overruled, it is an error for courts to follow it if it has ceased to reflect the customs, traditions and spirit of progresss, arising out of new conditions. There is in every court a discretionary power which after having due regard to the principle of *stare decisis* must be exercised so as to reflect the changed spirit of the times. The Roman law recognised the principle of desuetude, *i.e.*, to say of obsoleteness of law which the English Law does not recognise An amusing instance is given by the learned Judge of an English full Court gravely discussing the question as to how far wager of battle was a part of the law of the land and ultimately coming to the conclusion that it was a part of the law. So far as procedure is concerned it is an inherent power of the court to frame its procedure and it is the duty of the court to make it as much as possible perform its proper function of aiding the administration of justice and not obstructing it.

Sea Law and Sea power is another article in the same Journal. The writer points out that the growth of Sea Law has been from confiscation of enemy and neutral property towards the principle of pre-emption and says that the time has come to abolish confiscation of private property on land and sea except absolute contraband and to substitute the right of pre-emption in respect of all enemy property or property with enemy destination. This has been always the policy of the strongest naval power (of Britain for instance) while the contrary has been the policy of weaker naval powers. The one effect of this rule would be that it would not be open to any power to sink vessels carrying such property and distinction between combatants and non-combatants will have to be observed which the Germans have disregarded.

Another address printed in the same issue of the journal describes the nature and magnitude of the work of the alien property custodian in the United States of America. In the

exercise of the undoubted authority of the State to seize enemy property the custodian was appointed and directed to seize all such property in the United States whose value is estimated at 800 millions of dollars. By this, the power of mischief possessed by the alien was removed and enemy-owned corporations which refused to aid war work were made to do so. The amount realised by the sale of the concerns will have to be duly accounted for to the owners after the war. The writer suggests that similar claims of American citizens against Germany might be set off against German claims against the United States of America.

Mr. Blatt describes the undue pessimism exhibited by certain writers about the state of the American law and administration of justice as a sort of legal hypochondria. The bulk of overruled cases is not great and the capacities for evil would be highly magnified if the French system were adopted.

He recognises however the existence of the following evils :—

(i) Delay in trials.

(ii) Multiplicity of appeals and writs of error.

(iii) Judicial severity in criminal cases.

In the *Harward Law Review for January*, there is an excellent summary of the law of *action against* the property of sovereigns. A sovereign cannot be sued in his own courts without his consent. As a principle of International Law a similar immunity is extended to a foreign sovereign. The immunity extends not only in favour of the person of the sovereign, but also in favour of his ambassadors, his armies passing by consent through another country and his armed ships coming into a friendly port. At one time, there was an attempt made to distinguish property in possession of the State and that in possession of private individuals in which the State is interested and again between property dedicated to public uses and private uses. This distinction is mostly abandoned now. Property of all republics, whatever the purpose to which they are put will be regarded as devoted to public uses. The *dictum* of Sir Robert Phillimore in the *Charkiet* 4 L. R. A & P. 59 that the immunity does not apply to trading vessels has not been followed either in England or in America. Some distinction may possibly still be made as regards property devoted to

the private trading purposes of a personal sovereign. In (1916) P. D. 24. *The Broadmagne*, the view is expressed that this immunity extends even to private property requisitioned by the State for its purposes during the continuance of such use. When the sovereign comes into court as plaintiff he is bound by the usual rules governing litigants. He may be required to give security for costs, and he may be met by defenses, sets off and cross bills incident to the subject-matter of the action but a counter-claim or even an affirmative decree on the set off is not permissible. Because a foreign sovereign consents to an adverse judgment it does not follow that the decree can be executed against property belonging to him without his consent.

In the *Harvard Law Review for February*, Mr. Page contrasts the military law with the common law. Whereas the common law is based entirely on judicial precedents, the military law is more or less wholly statute law. In point of procedure, it differs from the common law in that it dispenses with the jury. Whereas in the common law the Judge is a lawyer, the tribunals constituted under the military law are composed of non-lawyers. On points of law, they take the advice of the Judge—Advocate which though not bound to follow they invariably follow. In all these features, it bears a close resemblance to the Roman Law with the praetor a non-lawyer official administering justice with the assistance of jurisconsults on points of law and unaided by jury. Another writer considers some of the problems in Probate and Administration in connection with executor *de son* tort; powers of the administrator and executor, and refunding. The principle of executor *de son* tort arises out of the peculiar doctrine of the English Law that the executor is entitled to act though he has not taken out probate and therefore if a man intermeddles with the estate, he may well be taken to be executor and sued It is said in one case that he has all the duties and none of the privileges of an executor. But he can plead payment of debts due from the estate in mitigation, though not in bar, of the claim against him by the executor. His payments if proper might be upheld. His sales if necessary and for proper consideration might also be upheld. The doctrine is not necessary under the modern conditions and in many states has been abolished altogether.

A writer in the *Yale Law Journal for January* sees no theoretical difficulty in recognising some of the several functions of state as being vested in the proposed League of Nations. The idea of Austin that all the highest attributes of sovereignty should be vested in a single body no longer finds acceptance and is opposed to the assumptions of the United States constitution and the constitutions of other States similarly constituted.

Claim of title in adverse possession is another article of interest in which certain problems relating to adverse possession are discussed. Adverse possession which is requisite to establish title and bar the rights of the real owner it is said, include five elements. It must be (1) hostile or adverse (2) actual, (3) visible ? notorious and exclusive, (4) continuous (5) and under claim of title. If the party in possession claims only a limited title, only to that extent is the owner's right extinguished. There is a difference of opinion as to whether possession on the supposition that the land belongs to the Government in the expectation of acquiring title under the Federal land laws would extinguish the title of the real owner. Some courts hold that it would not but the weight of authority is in favour of the view that it would. The fact that the possessor claims only a limited title would not save the title of the real owner in respect of the balance unless the former claims title in subordination to the latter. In some cases it has been held that possession by a person under the mistaken belief that the land is included within the boundaries of his deed, is only tentative and not adverse. The majority of decisions however hold that if there is an absolute claim of title it is not affected by what the holder might or might not have claimed had he known that he was mistaken. But if the intent is only to claim the true line wherever that may be, the holding is contingent and in subordination to the true title. Another set of problems considered is that raised by cases like Dalton *v.* Fitzgerald (a) A in adverse possession of land by a deed in form, conveys property to B for life, remainder to C. B's possession completes the requisite period of possession under the statute. Courts are agreed that in such a case, A's possession enures for the benefit of C.

(*b*) In the above illustration, suppose the deed is bad owing to any defect in formality or the disposition is illegal or

invalid for any reason. In that case, the better opinion is that though the title of the original owner is lost, the remainder-man does not acquire any title. The possession of B being derivative, he is entitled to tack his possession to that of A so as to entitle him to claim title by adverse possession against the real owner but he is not estopped from pleading the invalidity of the disposition in his favour. The fact that B claimed possession under the deed and recognised the title of C. is not sufficient to give C title.

(c) The same would be the case if A had title but the disposition or the deed is bad.

(d) Next suppose A had not possession or title and B entered into possession claiming under a deed. Here also the better opinion seems to be that B is not estopped from claiming absolute title.

In the same Journal for *February*, there is discussion as to the legal antecedents of the League of Nations in the sense of, steps taken towards the prevention of war before the idea a league of nations was started. The schemes of Sully and St. Pierre had little practical effect. The real controlling power was the Papacy till reformation and thereafter the International Law. The declaration of Paris, the Geneva Convention and the Hague Conventions are definite acts of legislation to this end however far they may fall short of the aspirations of their framers. Concurrently with the growth of International Law, there has taken place a movement in favour of international co-operation in matters of private law for instance the Berne Convention on copyright. The congresses of Europe during the last century mark another step. The progress of international arbitration has been another equally noteworthy step towards the same end.

BOOK REVIEWS.

THE GENERAL PRINCIPLES OF HINDU JURISPRUDENCE BY *Dr. Priya Nath Sen. 1918, Cambray & Co. Calcutta. Rs. 12.*

Though a large portion of Hindu Law has latterly ceased to be of practical importance in consequence of its supersession by Statute Law. the investigation and study of the system as a whole is not merely a patriotic duty on the part of Indians but of practical utility as well, in so far as the appreciation of the true principles of that jurisprudence is a material factor in the

correct ascertainment of such portions of the Hindu Law as can be still said to be living. As observed by Mr. Mayne about half a century ago, the Hindu Law can be interpreted and presented in its true spirit only by men who are Sanskritists and lawyers as well and it is scarcely necessary at the present day to remark that the subject has considerably suffered in the past by the treatment it received at the hands of men who not merely lacked the necessary qualification but were often not free from intellectual bias. Some of the publications in the Tagore lecture series have in a measure helped to redeem this state of things but most of them were confined to particular branches of the law and could not well deal with the whole field of Hindu Jurisprudence. The present volume which contains the lectures prepared by the late-lamented Dr. Priyanath Sen is, we believe, the first regular attempt by a duly qualified Indian to deal with this aspect of the subject. Works like those of Mr. J. C. Ghose and the late Mr. Sarkar and even that of Dr. Battacharya have practically confined themselves to such parts of the Hndu Law as are still enforced by our courts. By all accounts Dr. Sen seems to have been well-qualified for his task both by his erudition and by his love of the subject and it is a matter for deep regret that he did not live to give us the full benefit of his labours. The volume before us is an attempt to discuss some of the fundamental juristic conceptions as developed in the Hindu Law, in the different branches of the law of property, family law, adjective law and criminal law. The author himself points out that of the general law of contracts and of torts there is comparatively little to be found in the Hindu Law books. The treatment of the several topics taken up is mainly analytical though in several places the history of particular concepts is traced through the works of successive law givers or commentators. In respect of almost every important subject the author presents to the reader a comparison of the rules and conceptions of the Hindu Law with those of the Roman and the English systems and he claims (we hope not without justification) to have shown that Hindu jurisprudence will not compare unfavourably with even the most developed system of ancient jurisprudence. The author's admiration for the logical subtlety and analytical skill displayed in the writings of Hindu jurists finds emphatic expres-

sion in more than one place in the book and we feel that even a cursory reader of the book will be awakened to a better appreciation of the method as well as the substance of those writings than such of us as have derived enlightenment almost exclusively from our Western orientalists are generally wont to show. As the first attempt of its kind the work is more entitled to indulgence than criticism even for such defects as it may possess and the peculiar circumstances of its publication demand that we should seek to profit by the merits of the book rather than lay stress upon its drawbacks, if any. We heartily commend the subject as well as the work to all true lovers of Hindu Law and to all who have an honest desire to appraise the true worth of this ancient system.

BOWSTEAD'S DIGEST OF THE LAW OF AGENCY. 6TH EDITION, 1919 *London, Sweet and Maxwell Ltd., Price £1-7-6.*

In spite of some defects, a codified system of law has certain obvious advantages and in the absence of an authoritative Code its place is fairly well taken by Digests of different branches of the law prepared by eminent authors. This latter system has been coming more and more into vogue even in England during the last thirty or forty years and Mr. Bowstead's work on the Law of Agency is an instance already too well-known to the profession to require any introduction or commendation from us. As long as judicial decisions remain the sole and ultimate authority, such works have necessarily to be revised from time to time so as to embody the result of the case law as it grows from day to day and the 6 or 7 years that have elapsed since the last edition of this work was published have witnessed one or two changes in some of the fundamental rules pertaining to the Law of Agency and numerous developments in their manifold applications. The present Edition incorporates the case-law down to nearly the end of 1918.

FAULTS AND FALLACIES IN HANDWRITING IDENTIFICATION AND EXPERT EVIDENCE IN INDIA *By Hardless and Hardless 1919.*

We have great pleasure in announcing the publication of this small book on handwriting by the well-known handwriting experts in India. We have no hesitation in saying that the book is very pleasant and instructive reading and deals with the subject in a manner perfectly intelligible to lay readers. The object of the authors in writing this book is to expose the falsity of the features and the fallaciousness of the reasonings popularly ascribed to enuine and forged writings and signatures by practising experts in India. We have no doubt that it will be very useful for those who have to examine handwritings and signatures with a view to finding out their genuineness or otherwise and gladly recommend it for their use.

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